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Supreme Court of the United States

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October Term, 1978

No. 78-756

STATE OF OHIO,
Petitioner,

vs.

HERSCHEL ROBERTS,
Respondent.

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

QUESTION PRESENTED FOR REVIEW

In a criminal case where a witness testifies at a defendant's preliminary hearing and later is not produced at trial of the same defendant, and the State fails to show that said witness is unavailable and that it made a good-faith effort to secure the presence of the witness at trial, does the admission into evidence of such preliminary hearing testimony, deny the defendant his right to confront this witness under the Sixth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

The facts pertinent to the case at bar are as follows:

The defendant-respondent, Herschel Roberts, was arrested by the Mentor Police Department, in Mentor, Ohio, on January 7, 1975, and charged with forgery.

Shortly after respondent's arrest, a preliminary hearing was held in the Mentor Municipal Court in which the State of Ohio called a number of witnesses. The respondent called only one, Anita Isaacs, whom respondent's former court-appointed counsel observed in the court's hallway. (Anita Isaacs had come with her parents, witnesses for the State of Ohio, on Mr. Isaacs' alleged forged checks.) The witness, to Roberts' surprise, instead of defending him, testified adversely to his defense. At the conclusion of this probable cause hearing, the defendant-respondent, Herschel Roberts, was bound over to the Lake County Grand Jury.

Subsequently, the respondent was indicted on charges of forgery, receiving stolen property, and possession of heroin, and his case set for jury trial. It was at this time that the court-appointed attorney, who had called Anita Isaacs as a defense witness, asked for, and was given permission to withdraw as trial counsel. Marvin R. Plasco, the present attorney herein, was appointed on behalf of the defendant. As a result of this change in trial counsel, a mix-up by the Court in scheduling and other delays, the case was continued several times. Not all these continuances were a result of the defendant's actions.

On March 4, 1976, the jury trial commenced. During said trial and over respondent's objections, the trial court permitted, pursuant to Ohio Revised Code Section 2945.49, the introduction into evidence of the prior recorded testimony of Anita Isaacs from the Mentor Municipal Court.

Prior to the admission of the preliminary hearing testimony of Ms. Anita Isaacs, *counsel for respondent* called Mrs. Amy Isaacs, mother of Ms. Anita Isaacs, for a voir dire examination. During said examination, Mrs. Isaacs

testified that her daughter had been absent from the State of Ohio since the end of January, 1975, less than thirty (30) days after the preliminary hearing in which Anita had testified. Mrs. Isaacs further testified that she had talked twice with her daughter over this (13) month period, and had also talked with her daughter's social worker in San Francisco, California.

In checking the Lake County Clerk of Court's records on the case at bar, additional facts are shown. The case had been set for jury trial on five (5) different occasions, and five (5) subpoenas for Anita Isaacs, all to the same address, were issued. The first two show that returns were made on November 3rd and 4th, 1975 respectively. A third, showing a return of service on December 10, 1975, carried the advice on the subpoena to "please call before appearing" on the date of trial. The fourth and fifth returns, showing service on February 3, 1976 and February 25, 1976, and carry the same instructions. The address on the subpoenas was that of the parents of Ms. Anita Isaacs. All five subpoenas show that service on Anita Isaacs was made.

In contrast to this information, the State of Ohio failed to produce any witness or evidence that: (1) the subpoenaed witness, Ms. Anita Isaacs, never called, (2) the subpoenas were not personally served as the record so indicates, (3) that no one on behalf of the State of Ohio could determine Anita's whereabouts, (4) that no one had exhausted contact with the San Francisco social worker, and (5) the parents of Anita Isaacs stated that no one had left residence service of the subpoena for Anita at their residence.

The defendant-respondent, Herschel Roberts, was found guilty by the jury on all three (3) counts, and

subsequently appealed the convictions to the Eleventh Appellate District Court of Appeals, Lake County, Ohio. The Court of Appeals reversed the judgment of the trial court on the grounds that the admission of the preliminary hearing transcript violated the respondent's Sixth Amendment right to confrontation of witnesses, since the State had failed to show that said witness was unavailable and that it had made a "good-faith" effort to locate her.

After allowing a motion filed by the State of Ohio for leave to appeal, the Ohio Supreme Court affirmed the judgment of the Court of Appeals. The Ohio Supreme Court in affirming the Eleventh Appellate District, held that since the issues of a preliminary hearing versus those of a jury trial in the Common Pleas Court are quite different, the opportunity to cross-examine at the preliminary hearing cannot be said to afford confrontation for the purposes of a jury trial. Therefore, where the witness Anita Isaacs testified against Herchel Roberts at the preliminary and was not cross-examined, and later did not appear at trial, the Sixth Amendment precludes the State's use of the witness's recorded testimony, notwithstanding Ohio Revised Code Section 2945.49.

It is from the judgments of the Ohio Supreme Court and the Court of Appeals, that the State of Ohio sought a writ of certiorari.

SUMMARY OF ARGUMENT

I

In two distinct lines of cases, this Court has considered whether the admission of testimony taken at a preliminary hearing may be admitted into evidence at a jury trial in place of an unavailable witness' personal testimony.

A handful of cases beginning in 1879 concluded that the privilege to confront witnesses at trial was not offended if the defendant caused the witness to be absent. The purpose of the confrontation clause was offended where the state, through negligence or failure to diligently seek the presence of a witness, sought to use prior-recorded testimony because of the witness' unavailability. This Court has found that Common Law, from as early as the *Magna Carta*, has acknowledged the use of extrajudicial statements which are thought to be inherently reliable, such as the "dying declaration." Necessity, which has been called not the need to prosecute but the need to inform the jury, sometimes requires the use of other testimony in absentia. Reliability was the common denominator of all such testimony approved by this Court.

The more modern line of cases has applied the confrontation clause of the Sixth Amendment to the states, and set forth meaningful and workable requirements on the use of transcript testimony as an exception to the clause. The use of an unavailable witness' prior-recorded statements now requires a showing of unavailability. The state bears the burden of proving that it made a diligent attempt to locate and secure such a witness' presence. The sophisticated and wide-reaching resources of the States in the area of law enforcement, requires no less in light of the fact that a Constitutional privilege is being overlooked by the confrontation clause exception.

The requirement of reliability is still retained. The Court has always found the indicia of reliability necessary to allow an exception to the confrontation clause by examining the totality of the circumstances. Never have the form requirements of oath, recording, and a magistrate's direction, imposed by state criminal rules at preliminary hearings, been called sufficient indicia of reliability, standing alone, to justify the recognized exception.

II

Before admitting the preliminary hearing testimony of Anita Isaacs at the trial of Herschel Roberts a voir dire examination of the witness' mother disclosed that Anita's whereabouts were unknown and that she was missing since two weeks after the preliminary hearing. This voir dire was requested by defense counsel. The state was totally unprepared at trial to meet the burden of unavailability. No one from the state testified that any effort was made to find Anita Isaacs and secure her presence at trial. Despite the testimony of the mother that the daughter was missing since January, 1975, the Lake County Clerk of Court records show that five (5) subpoenas to Miss Isaacs prior to trial were all returned as served. Such negligence or lack of diligence by the State cannot support the exception sought by the State at trial.

III

The Ohio Eleventh District Court of Appeals found from the record it received that evidence showed Anita Isaacs was involved with the defendant. That Court further expressed that a lack of candor was shown by the mother's voir dire testimony. These conclusions cast doubt on the reliability of Anita's preliminary hearing testimony. Further doubt is cast by the sudden absence of the witness in light of five (5) subpoenas returned as served. The trappings of a preliminary hearing, standing alone, will not suffice to admit testimony which otherwise bears indicia of *unreliability*.

IV

The present counsel for Herschel Roberts was court-appointed when the case was set for trial. A different attorney represented him at the preliminary hearing, but

withdrew from the case prior to trial. A specific rule fashioned by this Court in *California v. Green* precludes the use of preliminary hearing testimony at trial where different counsel represent a defendant, irrespective of whether cross-examination occurred.

V

The rule which petitioner asks this Court to embrace—that without any other indicia of reliability, the fact that testimony was taken at preliminary hearing justifies admission as an exception to confrontation clause requirements—would create chaos in courts conducting such hearings. Each and every preliminary hearing would become a drawn-out ordeal where each witness is extensively cross-examined to avoid facing a successful *ex parte* conviction at trial. The Ohio Supreme Court, and other courts, have properly overruled the use of preliminary hearing testimony at trial where the pro forma nature of the hearing prevents actual or adequate cross-examination, and no independent indicia of reliability exist.

ARGUMENT

I. The Case Law

Although never specifically faced with the question presented herein, the prior decisions of this Court clearly indicate that the decisions of the courts below properly held that respondent was denied his right to confront witnesses at trial, as guaranteed by the Sixth Amendment.

Reynolds v. United States,¹ was one of the earliest cases to consider the use of prior recorded testimony when

1. 98 U.S. 145 (1879).

a witness was unavailable to testify at trial. The absent witness' testimony admitted in *Reynolds* was taken at a former trial of the accused for the same offense, at which the witness was cross-examined. Further, at this second trial, the missing witness was shown to be absent because of procurement or connivance on the part of the defendant. Thus, this Court concluded that the Sixth Amendment "grants . . . the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witness away, he cannot insist on his privilege."²

In *Mattox v. United States*,³ the Court allowed the use of prior testimony of two witnesses who died prior to the trial. As in *Reynolds*, the testimony admitted into evidence was recorded at a prior trial of the same charge where full cross-examination was conducted before the jury.⁴

The Court discussed the confrontation clause in *Mattox* in terms apart from *Reynolds*. Whereas *Reynolds* considered only the privilege aspect of confrontation, *Mattox* further developed both the primary purpose of the clause and the manner in which that substance is protected. The Court noted:⁵

"The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not

2. *Id.*

3. 156 U.S. 237 (1895).

4. *Mattox's* first conviction was reversed by this Court for other reasons. 146 U.S. 140.

5. 156 U.S. at 242-243.

only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."

The Court pointed out that occasion and necessity might cause exceptions to the rule to be developed, such as the dying declaration, inherited from the English common law long before the Constitution. Other exceptions could be upheld where the "primary object" of testing the witness before the jury, is not foreseen. Thus, the Court found that the admission of prior trial testimony of a deceased witness, subjected to full direct and cross-examination, did not forsake the "primary object", the Court stating:⁶

"The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of. . ."

Motes v. United States,⁷ considered whether the Sixth Amendment right to confront witnesses was offended by the admission of examining trial testimony of an absent witness at a final trial, where absence was due to prosecutorial neglect rather than death or conduct of the defendant. In holding that the confrontation clause is offended under circumstances amounting to prosecutorial neglect, this Court adopted the view of Cooley, in his *TREATISE ON CONSTITUTIONAL LIMITATIONS*, that certain exceptions

6. 156 U.S. at 244.

7. 178 U.S. 458 (1900).

to this general rule shall apply. These exceptions would arise when prior direct examination and cross-examination occurred at an earlier trial, or upon deposition, and "the witness has since deceased, or is insane, or sick and unable to testify, or has been summoned but appears to have been kept away by the opposite party."⁸ The Court held that since none of the recognized exceptions applied, that the right to confront witnesses was denied.

In *West v. Louisiana*,⁹ a forerunner of *Barber v. Page*,¹⁰ this Court held that the admission of prior testimony taken at a preliminary hearing, and subject to cross-examination, was not a violation of the due process clause. The Court reaffirmed the four exceptions to the confrontation clause adopted by *Motes*. The Court stated:¹¹

"The substantial and fundamental right of confrontation is subject to but four exceptions: First, where the witness is dead; second, where the witness is so ill that it is unlikely that he will ever be able to appear in court; third, where the witness has become insane; fourth, where, through the procurement or connivance of the accused, the witness has been prevented from attending."

In considering other exceptions to the general rule, the Court looked with disdain on less than adequate attempts to procure witnesses. The *West* Court stated:¹²

"Neither the commentators on the law or evidence, nor the courts called upon to expound it, have shown

8. 178 U.S. at 472.

9. 194 U.S. 258 (1904).

10. 390 U.S. 719 (1968).

11. 194 U.S. at 260.

12. *Id.*

any inclination to lend a willing ear to the plea of convenience."¹³

The more modern line of cases considering the use of prior recorded testimony as a proper exception to Sixth Amendment constraints began with *Pointer v. Texas*.¹³ *Pointer* rejected the trial court's use of a preliminary hearing transcript containing the testimony of a witness who had left the jurisdiction, where it appeared that *Pointer* was not represented by counsel¹⁴ and he did not cross-examine the absent witness at the preliminary hearing. Today, the *Pointer* decision extends the Sixth Amendment right to confront witnesses to proceedings conducted in the state courts. The Court reaffirmed the exceptions noted in *Motes*, discussed above, and held further, that:¹⁵

"the right of an accused to be confronted with the witnesses against him must be determined by the same standards whether the right is denied in a federal or state proceeding."

The Court in *Pointer* did not hold, as petitioner maintains, that the "mere" opportunity for defense counsel to cross-examine the missing witness satisfies the Sixth Amendment guarantees. This Court did say that there must be an "adequate"¹⁶ opportunity for cross-examination to allow admission of preliminary hearing testimony at trial.¹⁷

13. 380 U.S. 400 (1965).

14. The Court refused to rule on the applicability of *Gideon v. Wainwright*, 372 U.S. 335 (1963), because the Texas "examining trial" appeared substantially different from the traditional preliminary exam wherein pleas are entered and the exam for probable cause is conducted.

15. 380 U.S. at 407, 408.

16. *Id.*

17. Although whether contemporaneous or subsequent cross-examination is required was later addressed in *California v. Green*, 390 U.S. 149 (1970).

In *Barber v. Page*,¹⁸ the Court again considered the burden of unavailability that the prosecution must meet to allow, at trial, the use of testimony taken at a preliminary hearing. Petitioner in *Barber v. Page*, had been convicted on the basis of testimony introduced through the transcript of the preliminary hearing. The witness in question, at the time of trial, was incarcerated in a federal prison in another state. No attempt by the State in *Barber*, as herein, had been made to bring this missing witness to trial. Further, the defendant's counsel had not cross-examined the witness at the earlier preliminary hearing.

In discussing the unavailability aspect of *Barber v. Page*, the Court held that mere absence from the jurisdiction is not enough in view of the increasingly sophisticated methods available to law enforcement and prosecuting agencies.¹⁹ While the prosecution in *Barber* felt that there was a possibility that federal prison officials might refuse to cooperate in making the witness available, this Court relied on the opinion of designated Judge Aldrich, in dissent, below, stating:²⁰

"the possibility of a refusal is not the equivalent of asking and receiving a rebuff."²¹

18. 390 U.S. 719 (1968).

19. The Court discussed specifically the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings and the common law writ of habeas corpus ad testificandum.

20. 390 U.S. at 724.

21. Likewise, respondent urges that the manner in which the State of Ohio sought to show unavailability, merely by the mother's response that the witness is missing, constituted a complete dearth of effort in terms of the "good-faith" ultimately contemplated by *Barber v. Page*.

Thus, respecting unavailability, this Court concluded:²²

"In short, a witness is not 'unavailable' for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial."

And, respecting the lack of a "good-faith" effort:²³

"The right of confrontation may not be dispensed with so lightly."

The exception discussed above, as developed through *Mattox* and *Pointer*, and stated by way of headnote in *Barber*, now requires that cross-examination had occurred at the prior deposition:²⁴

"There is an exception to an accused's constitutional right to be confronted with the witnesses against him where a witness is unavailable and has given testimony at previous judicial proceedings against the same accused which was subject to cross-examination by that accused."

Barber v. Page also recognizes that practical differences between preliminary hearings and full-blown trials must be considered in determining whether cross-examination at a preliminary hearing will satisfy the confrontation clause for the purposes of the "unavailable" exception, stating:²⁵

"The right to confrontation is basically a trial right. It includes both the opportunity to cross-exam-

22. 390 U.S. at 724-725.

23. *Id.*

24. 390 U.S. 719, headnote #1.

25. 390 U.S. at 725.

ine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial."

While petitioner maintains that this Court's holding in *Barber v. Page*, respecting use of preliminary hearing testimony of an unavailable witness at a subsequent trial for the same offense, is diluted by the Court's later holding in *California v. Green*,²⁶ the congruence between the two decisions is highly visible.²⁷

Green was convicted at a trial at which the preliminary hearing testimony of a witness, Porter, was introduced to refresh Porter's memory after he became evasive and forgetful while testifying at trial. Porter was in fact cross-examined extensively at both the preliminary hearing and the subsequent trial. Further, cross-examination on behalf of Green was conducted by the same attorney at both the preliminary examination and the trial.

Part of the question in *Green* was whether the jury's inability to test the demeanor of the witness at the preliminary hearing deprived Green of his full confrontation rights. This Court properly held that subsequent cross-examination before a jury properly fulfills the objectives of the confrontation clause.

Petitioner herein²⁸ urges that the following portion of *Green* favors the use of preliminary hearing testimony at

26. 390 U.S. 149 (1970).

27. See Brief of Petitioner, p. 17.

28. Petitioner's brief at pp. 18, 19.

trial in a manner which disregards the constraints of *Barber v. Page*.²⁹

"We also think that Porter's preliminary hearing testimony was admissible as far as the Constitution is concerned wholly apart from the question of whether respondent had an effective opportunity for confrontation at the subsequent trial. For Porter's statement at the preliminary hearing had already been given under circumstances closely approximating those that surround the typical trial. Porter was under oath; respondent was represented by counsel—the same counsel in fact who later represented him at the trial; respondent had every opportunity to cross-examine Porter as to his statement; and the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings. Under these circumstances, Porter's statement would, we think, have been admissible at trial even in Porter's absence if Porter had been actually unavailable, despite good-faith efforts of the State to produce him. That being the case, we do not think a different result should follow where the witness is actually produced."

The consistency with *Barber* is abundantly evident. The Court hypothesized that the question could be answered in terms of *Barber* apart from whether the trial itself occasioned effective cross-examination. The *Barber* requirements *could* be met because extensive cross-examination in fact occurred at the preliminary examination, conducted by the *same* counsel, if the witness were unavailable and a "good-faith effort" made by the State to produce the witness was unsuccessful.

29. 399 U.S. at 165.

Since the privilege of confrontation would not be offended if the witness were absent, his presence at trial, guaranteeing additional subsequent cross-examination, certainly would not offend the privilege in light of the earlier case.

Green further holds that preliminary hearing testimony is admissible at a trial regardless of the effectiveness of the cross-examination at the preliminary hearing if four requirements are met. These requirements are:³⁰

- (1) the declarant was under oath at the preliminary hearing;
- (2) the accused was represented at the preliminary hearing by the same counsel who later represented him at trial;
- (3) the accused had every opportunity at the preliminary hearing to cross-examine the declarant as to his statement;

and,

- (4) the proceedings at the preliminary hearing were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings.

The vitality of the foregoing has never been questioned. Respondent urges that this holding is completely dispositive of the confrontation issue herein since Herschel Roberts was represented at the preliminary hearing by another court appointed attorney. The present attorney for Respondent, Marvin R. Plasco, has represented Roberts since the date that the trial was set in the Lake County Common Pleas Court, at which time prior counsel withdrew and Plasco was appointed to represent the indigent defendant.

30. 26 L. Ed. 2d 491, headnote 6.

The State of Ohio erred in its analysis of *Green* in one further respect. Petitioner maintains that *Green* "categorized the preliminary hearing as indicia of reliability" which support the use of testimony taken therein at a subsequent trial.³¹ On the contrary, *Green* emphasized that traditional evidentiary indicia of reliability must be scrutinized before any hearsay evidence is admitted. Although procedural safeguards may tend to favor reliability, according to Justice Brennan:³²

"The reliability of pretrial testimony. . . is not determined simply by the circumstances under which it was given."

Justice Brennan stated the need to scrutinize "subsequent developments", or those events which occur after a preliminary examination but before the trial. Among these developments is an unwillingness to testify.³³ In concluding that unwillingness to testify casts serious doubts on the reliability of prior testimony, Justice Brennan stated:

"Reliability cannot be assumed simply because a prior statement was made at a preliminary hearing."³⁴

This Court has during the past decade decided two other cases raising the issue of confrontation under the Sixth Amendment. In *Dutton v. Evans*,³⁵ a co-defendant's post-arrest statement was held admissible despite the fact that there had been no actual confrontation because the statement possessed sufficient "indicia of reliability."

31. This contention appears at petitioner's brief, page 25.

32. Dissent of Justice Brennan, 390 U.S. at 201-202.

33. Although Justice Brennan discussed both unavailability and unwillingness to testify, respondent maintains that personal motives may cause an overlap, where, as herein, Anita Isaacs became unavailable because of her unwillingness to testify at trial.

34. 390 U.S. at 202.

35. 400 U.S. 74 (1970).

However, *Dutton* is not significant since said testimony was admitted on the basis of a Georgia statute allowing admission of a co-defendant's statement against other defendants. Further, the statement did not "involve evidence in any sense crucial or devastating"³⁶ since more than twenty (20) prosecution witnesses appeared and testified for the State against Evans, and therefore, the triers of the fact (jurors) had a satisfactory basis for evaluating the truth of the prior statement.³⁷

In *Mancusi v. Stubbs*,³⁸ the defendant Stubbs was convicted when the transcript of an important prosecution witness's testimony was introduced during a retrial of the defendant.³⁹ In upholding the second conviction, this Court stated that more than ten (10) years had lapsed between the first and second trials, and the witness had since permanently moved to Sweden and was thus unavailable to testify at the second trial.⁴⁰ Further, this Court held that the first trial was before a jury where the defendant's counsel had cross-examined the witness and that "the trier of the fact (had) a satisfactory basis for evaluating the truth of the prior statement."⁴¹ Thus, "before it can be said that an accused's constitutional right to confront witnesses was not infringed at the accused's second trial, the adequacy of the examination of the witness at the accused's first trial must be taken into consideration. . ."⁴²

36. *Id.* at 226.

37. 408 U.S. 204 (1972).

38. 408 U.S. 204 (1972).

39. The first trial resulted in a conviction which was overturned in federal habeas corpus proceedings.

40. The witness's son testified in the second trial that his father had become a resident of Sweden during this period between the first and second trials.

41. *Id.* at 303.

42. *Id.* at 301.

II. Petitioner Failed to Show That Anita Isaacs Was Unavailable and That It Made a Good-Faith Effort to Locate Her

As early as *Motes v. U.S.*⁴³, this Court held that the right of an accused under the United States Constitution, Sixth Amendment, to be confronted with witnesses against him is violated by permitting the statement of an absent witness taken at an earlier trial or hearing to be admitted in a later trial, when it does not appear that the witness was absent by suggestion, connivance or procurement of the accused, but, it does appear that his absence was due to the *negligence* of the prosecution.

The landmark case of *Barber v. Page* placed upon the State the burden that to show unavailability,⁴⁴ they must also show a "good-faith" effort to locate the absent witness. What constitutes a good-faith effort by the prosecutorial authorities to secure the witness's presence at trial is necessarily a factual question which must be determined in light of the circumstances in each case. *Eastham v. Johnson*.⁴⁵ To show this good-faith effort, the State must do more than just suggest or show that the absent witness is out of the jurisdiction of the State where the defendant is being tried.⁴⁶ Minimally, a good-faith effort would require the State to prove that they have conducted a diligent search of the witness. *Holman v. Washington*.⁴⁷

In the case at bar, respondent was convicted after the trial court admitted over his objections, the prior recorded preliminary hearing testimony of Anita Isaacs. The only

43. *Supra* at 473.

44. *Supra*.

45. 338 F. Supp. 1278 (E.D. Mich. 1972).

46. *Barber v. Page, supra*.

47. 364 F.2d 618, 623 (5th Cir. 1966).

evidence of the unavailability of Anita came as a result of a voir dire examination of Mrs. Amy Isaacs, one of the State's witnesses, requested by counsel for respondent.

The respondent was subsequently convicted and appealed to the Eleventh District Court of Appeals, Lake County, Ohio. The Court of Appeals reversed respondent's convictions relying upon *Barber v. Page*,⁴⁸ holding that the admission of the preliminary hearing testimony violated respondent's right to confront witnesses against him because the State of Ohio did not clearly show to the Court that the witness was unavailable, nor had the State made a good-faith effort to secure her presence at the trial below.

The Ohio Supreme Court, after granting the State's motion for leave to appeal, affirmed the reversal of the convictions. The Ohio Court, after review of *Barber v. Page*⁴⁹ and *California v. Green*,⁵⁰ affirmed, but concluded that the proof of unavailability required by *Barber* was satisfied at the trial court below. In so holding, the Ohio Court stated that:

"... the trial judge could reasonably have concluded from Mrs. Isaacs' voir dire testimony that due diligence could not have procured the attendance of Anita Isaacs."

This is contrary to this Court's holding in *Barber v. Page*⁵¹ which stated:

"The possibility of a refusal is not the equivalent of asking and receiving a rebuff."⁵²

48. *Supra*.

49. *Supra*.

50. *Supra*.

51. *Supra*.

52. 390 U.S. at 724.

Further, the United States Court of Appeals for the District of Columbia has held that such a search (for an absent witness) must be equally as vigorous as that which the State would undertake to find a critical witness if it has no preliminary hearing testimony upon which to rely.⁵³

Application of these principles to the facts at bar illustrate that on five (5) different occasions, five (5) subpoenas for Anita Isaacs, all to the same address, were issued. The first two show that returns were made on November 3rd and 4th, 1975, respectively. A third, showing a return of service on December 10, 1975, carried the advice on the subpoena to "please call before appearing" on the date of trial. The fourth and fifth returns, showing service on February 3, 1976 and February 25, 1976, carry the same instructions. The address on the subpoenas was that of the parents of Miss Anita Isaacs. All five subpoenas show that service on Anita Isaacs was made.

In addition to the issuance of five (5) subpoenas with service upon Anita Isaacs, there is the voir dire testimony of Mrs. Isaacs that she had talked with her daughter as well as the daughter's alleged social worker in San Francisco, California.

If Anita Isaacs were truly unavailable, why did not the prosecution introduce evidence that Anita no longer was a resident of the jurisdiction? Why did not Anita's parents, victims as to the crime that respondent was charged with, call and complain about the five (5) different subpoenas? The Court of Appeals, in following *Barber v. Page*,⁵⁴ held in their opinion, that no other evi-

53. *United States v. Lynch*, 499 F.2d 1011 (D.C. Cir. 1974).

54. *Supra*.

dence was offered other than the uncorroborated testimony of Mrs. Amy Isaacs, one of the victims. Further, respondent's counsel had to ask for and conduct the voir dire examination; why did not the State's attorney request a voir dire of Mr. and Mrs. Isaacs? The State failed to even attempt to carry this burden.

Respondent's contention is that the State of Ohio was negligent, just as in *Barber v. Page*;⁵⁵ that they failed to make a good-faith effort to locate or look for the witness since they had a preliminary hearing transcript and it was not necessary to bother further. Therefore, the Ohio Supreme Court's finding that the witness was unavailable is incorrect since there exists not a shred of evidence other than the voir dire conducted by respondent's counsel as to Anita's whereabouts. Further, the local authorities' negligence or failure to make this good-faith effort to locate Anita denies respondent his right to confront this vital witness.

III. The Preliminary Hearing Testimony of Anita Isaacs Lacked the Indicia of Reliability Necessary for Admission As an Exception to the Confrontation Rule

Since the holding of this Court in *Mancusi v. Stubbs*, the mere demonstration that a witness is unavailable despite "good-faith" efforts to secure her attendance is no longer sufficient to permit the use of prior-recorded testimony. The testimony in question must also bear sufficient indicia of reliability if it is to be admitted.

A review of various factors which bear on the question of the reliability of this witness' testimony clearly demonstrates that the indicia of reliability necessary to

55. *Supra*.

admit the transcript in the witness' absence are completely lacking herein.

Herschel Roberts' theory of defense at each and every proceeding pertaining to the single count of forgery was that Anita Isaacs, the missing witness, gave him the checks and credit cards of her parents, the complaining witnesses.

Because Roberts' attorney at the preliminary hearing was aware of this fact, he called Anita Isaacs with the remote hope that her testimony would exculpate Roberts and prevent subsequent consideration by the grand jury. Roberts' court appointed counsel did not subpoena Anita Isaacs for this purpose. Rather, Anita Isaacs was spotted by defense counsel in the court lobby, having come to the hearing with her parents. The testimony elicited on direct did not exculpate Roberts.

Mancusi, Green and *Evans* all suggest that reliability of testimony is assured where actual and adequate cross-examination occur. Indeed, in *Green*, the witness, Porter, was cross-examined extensively at both the preliminary hearing and at the trial with respect to the transcribed testimony in question. Thus, reliability was well assured in *Green*. In *Dutton v. Evans* reliability was assured because the trier of fact could weigh the co-conspirator's out of court statement against the in-court testimony of more than twenty (20) other prosecution witnesses, including eyewitness accounts.

In *Mancusi*, reliability of an unavailable witness was founded on the fact that the testimony was taken at a former trial, where it was previously weighed by a jury. *Mancusi* concluded in weighing reliability that "the adequacy of the examination of the witness at the accused's first trial must be taken into consideration . . ."⁵⁶ Thus

56. 408 U.S. 24.

Mancusi militates against the State's conclusion that the mere opportunity to cross-examine the absent witness at the preliminary hearing, *standing alone*, provides an adequate indicium of reliability for the purposes of meeting the accepted confrontation clause exception.⁵⁷

There is nothing to indicate that any cross-examination of Anita Isaacs took place. The courts below both concluded that no cross-examination occurred. Where no cross-examination occurs at the prior hearing the adequacy standard remains unfulfilled.

Other opinions of this Court indicate that the fact that testimony occurred at a preliminary examination, standing alone, is an unlikely barometer of reliability. Justice Brennan, in *Green*, dissenting opinion, stated:⁵⁸

"It appears, then, that in terms of the purposes of the Confrontation Clause, an equation of face-to-face encounter at the preliminary hearing with confrontation at trial must rest largely on the fact that the witness testified at the hearing under oath, subject to the penalty for perjury, and in a courtroom atmosphere. These factors are not insignificant, but by themselves they fall far short of satisfying the demands of constitutional confrontation. Moreover, the atmosphere and stakes are different in the two proceedings. In the hurried, somewhat pro forma context of the average preliminary hearing, a witness may be more careless in his testimony than in the more measured and searching atmosphere of a trial. Similarly, a man willing to perjure himself when the consequences are simply that the accused will stand trial may be less willing to do so when his lies may condemn the defendant to

57. This contention is stated at page 35 of Petitioner's brief.

58. 390 U.S. at 198-199.

loss of liberty. In short, it ignores reality to assume that the purposes of the Confrontation Clause are met during a preliminary hearing. Accordingly, to introduce preliminary hearing testimony for the truth of the facts asserted, when the witness is in court and either unwilling or unable to testify regarding the pertinent events, denies the accused his Sixth Amendment right to grapple effectively with incriminating evidence."

Indeed, the Ohio Supreme Court agrees that the Ohio preliminary exam is the type of pro forma hearing where only a fool would attempt to conduct extensive cross-examination.⁵⁹ Both the Ohio Supreme Court and the authority on which it relies,⁶⁰ emphasize the importance of deciding the issue in practical rather than esoteric terms. Ignoring the reality of the scope of a preliminary hearing in reaching a rule could lead ultimately to greater court congestion by requiring preliminary hearings to be conducted with the same exactitude as a trial. The difference between probable cause and guilt beyond a reasonable doubt should prevent such a result. So also should the fact that no discovery is available prior to a preliminary hearing militate against requiring the accomplishment of extensive cross-examination of every preliminary witness simply to prevent future prejudice.⁶¹ Without discovery prior to the preliminary hearing due process arguments must be raised, focusing on the inability to prepare at such a crucial point.⁶²

59. See Opinion of Ohio Supreme Court, Petitioner Brief for Cert., pp. 20-23.

60. *Government of the Virgin Islands v. Aquino* (3rd Cir. 1967), 378 F.2d 540, 549.

61. Thus, the mere "notice of such statute" rule of *Havey v. Kropp*, 458 F.2d 1054 (6th Cir. 1972), seems overly harsh. Further, adoption of such rule will create a flood of litigation respecting the due process aspects of such a use of testimony, perhaps welcomed by Justice Harlan.

62. *Id.*

A. Subsequent developments cast doubt on the reliability of preliminary hearing testimony of Anita Isaacs

A look at developments subsequent to the preliminary hearing, but before the trial, casts grave doubts on the reliability of Anita Isaacs as a witness. The preliminary hearing took place on January 10, 1975. Before the end of January, 1975, Anita Isaacs disappeared from the area.

This respondent has suggested at each appellate level that the witness absented herself from the area to avoid either perjury or incriminating herself at later proceedings. Indeed the Ohio Eleventh District Court of Appeals concluded from the transcript of the preliminary hearing, the trial, and the voir dire examination of Mrs. Isaacs, that cross-examination at trial demonstrated Anita Isaacs' involvement with Roberts and that Mrs. Isaacs was less than candid in providing information as to her whereabouts.⁶³

The voir dire testimony of Mrs. Isaacs, mother of the missing witness, when compared to dates of service on state subpoenas, further indicates that the reliability of the missing witness' testimony was highly suspicious.

The only address by which the State could reach Anita Isaacs was the same as that of her parents. Also of great importance is the fact that Mr. and Mrs. Isaacs were the victims and complaining witnesses at the trial. As noted earlier, five (5) subpoenas to the residence to produce Anita Isaacs were returned as served. The first two of these were returned November 3rd and 4th, 1975. According to Mrs. Isaacs, on voir dire conducted on the second day of trial, at defense counsel's request, Anita had been absent from the area since immediately after the preliminary hearing. Yet, Mrs. Isaacs never told the State that

63. See Court of Appeals Opinion, Appendix of Petitioner.

this important witness was missing, nor gave anyone any indication that the service of the subpoenas was not successful. The third subpoena, served on December 10, 1975, produced the same result: no indication of the witness' absence or further information. The final two subpoenas, returned on February 3rd and 25th, 1976, show the same result: no indication of the witness' absence or further information.

The blatant contradiction between the information available at the Lake County Clerk of Court's office regarding the subpoenas and the voir dire testimony of the witness' mother casts grave doubts on the reliability of the prior-recorded testimony.⁶⁴

IV. California v. Green Precludes the Use of Preliminary Hearing Testimony Where Different Counsel Represent Defendant at Trial

In *California v. Green* the Court looked strongly on the fact that Green had the same counsel at both proceedings. Although *Green* did not raise the question of whether unavailability of the witness would create a different result, the Court did hypothesize that if unavailability was properly demonstrated, the testimony would still be admissible at trial, even absent effective cross-examination. By the way of headnote,⁶⁵ this Court held that preliminary hearing testimony of an unavailable witness may be used if unavailability is shown and four (4) requirements are

64. The reliability of Mrs. Isaacs' statements on voir dire is also questionable, the state having failed to corroborate the story of Anita's absence in any manner whatsoever, even whether Anita in fact had a California based social worker. See argument at II.

65. 25 L. Ed. 2d 491, n.6.

met, including representation by the same counsel at both proceedings. This rule in *Green* was stated thusly:

"Under the confrontation clause of the Federal Constitution, preliminary hearing testimony is admissible regardless of whether the accused has an effective opportunity at his subsequent state criminal trial to confront the declarant who gave such testimony, where (1) the declarant was under oath at the preliminary hearing, (2) *the accused was represented at the preliminary hearing by the same counsel who later represented him at the trial*, (3) the accused had every opportunity at the preliminary hearing to cross-examine the declarant as to his statement, and (4) the proceedings at the preliminary hearing were conducted before a judicial tribunal, equipped to provide a judicial record of the hearing..." (emphasis supplied)

The cases which followed *Green* have not disturbed, or even discussed this holding. At the preliminary examination, Roberts was not represented by the same attorney who represented him at all subsequent proceedings.⁶⁶

This rule in *Green*, then, should conclusively bar the use of preliminary examination testimony at the trial herein, where the defendant was given a new court-appointed attorney shortly before the trial.

V. Adoption of Petitioner's Rule Would Result in Manifest Impracticability at the Municipal Court Level

As several courts have pointed out, equating cross-examination at a preliminary hearing with cross-examination at trial ignores the reality of the preliminary hearing on a practical level. Adoption of petitioner's rule that

66. Thus, the "fishing expedition" comment of the trial judge, at Petitioner's Appendix, p. 14, seems extremely inappropriate.

the "mere opportunity" to cross-examine any person at a preliminary hearing satisfies the confrontation clause would create a landmark decision which would again revolutionize the area of criminal procedure. The practical end result would be the creation of some type of "committing" court which could adequately accommodate week-long or month-long preliminary hearings at which a searching cross-examination of all witnesses could be undertaken, merely to protect from future unforeseen confrontation issues.

In the instant case, petitioner's assertion would require that once confronted with adverse testimony on direct examination, counsel must declare the witness hostile in order to conduct cross-examination. Voucher rules notwithstanding, to extend such a rule to criminal preliminary examinations is ludicrous. Not only would defense attorney have to cross-examine, but before so doing, or contemporaneously with such cross-examination, defense counsel would have to conduct the type of direct examination which the prosecution is responsible to develop. It is difficult to see how a defense attorney could fulfill his ethical obligations to his client by developing the case against his client as a gratuity to the state.⁶⁷

The pro forma nature of the preliminary hearing in most, if not all, jurisdictions developed from the practical realities of the day-to-day regimen of courts impressed with the responsibility of directing such proceedings. In spite of petitioner's illusions and allusions that the Ohio

67. Indeed, Roberts' counsel at the preliminary hearing may have been limited by the privileged nature of the information needed to impeach Miss Isaacs, with whom he had an intimate personal relationship which she obviously tried to hide. Only her admission that this "acquaintance" borrowed her car for days at a time alludes to this fact, although the Court of Appeals found other evidence within the trial transcripts. See Petitioner's Appendix, p. 5.

criminal rules permit unimpeded cross-examination, attorneys familiar with a particular court know the limits and interests of the bench in conducting preliminary hearings. The Ohio Supreme Court agreed in the opinion below that few rights are, or can be, adamantly protected at a preliminary hearing, as at a trial. Indeed, although no comment appears on the transcript that time was a factor, who knows whether the judge pointed at his watch indignantly, or suggested in chambers that the proceedings should be brief?

Respondent's prior attorney was familiar with the Mentor Municipal Court, and doubtless shaped his preliminary hearing presentation to conform with that court's expectations or accepted practices.⁶⁸

It is infinitely more practical in the long run for this Court to impress on prosecutors the need to exert all due diligence in procuring a witness, or demonstrate such diligence to support the unavailability exception, than it is to fashion a rule which will revolutionize criminal procedure so that defense attorneys may protect the public from the fear of conviction by *ex parte* affidavits.

68. In larger Ohio counties, notably Cuyahoga, preliminary hearings are informally conducted at the bench. Thus, the *per se* indicia of reliability of oath, magistrate's presence and presence of counsel are not firmly impressed enough to constitute actual indicia of reliability in the final analysis for the purpose of supporting an exception to the confrontation clause constraints.

CONCLUSION

The Supreme Court of Ohio properly held that Herschel Roberts was denied the right to confront a witness by the use of transcript testimony of an absent and uncross-examined witness. This Court is asked to overrule the Ohio Supreme Court in its finding that the State properly demonstrated that it used due diligence and a good-faith effort to locate the witness as required by this Court in *Barber v. Page*. The judgment should be affirmed.

Respectfully submitted,

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